No. 104

IN THE

Supreme Court of the United States

October Term, 1952

WARNER D. ORVIS, HOMER W. ORVIS, FLOYD Y. KEELER, F. HOWARD SMITH, HAROLD A. ROUSSELOT, HENRY H. BALFOUR J. ANTONIO ZALDUONDO, WILLIAM G. WIGTON, CLIFFORD J. DOERLE, and HERBERT R. JOHNSON, doing business under the firm name and style of ORVIS BROTHERS & Co., and JOHN J. MCCLOSKEY, JR., as City Sheriff of the City of New York,

Petitioners,

against

JAMES P. MCGRANERY, Attorney General of the United States, as Successor to the Alien Property Custodian,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 30, 1952.

Opinions Below

The decision of the District Court was endorsed on the papers without other opinion (R. 66). The opinion of the Court of Appeals (R. 76-79) is not reported.

Jurisdiction

The judgment of the Court of Appeals (R. 80) was entered on June 30, 1952. A petition for rehearing, filed on July 14, 1952 (R. 81), was denied on July 29, 1952 (R. 88). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Question Presented

Does an attachment secured by United States nationals in accordance with the laws of the State of New York upon alien enemy assets subsequently vested by the Alien Property Custodian create an interest, right or title sufficient to support an action by the attachment creditor and the Sheriff of New York County under Section 9(a) of the Trading with the Enemy Act? Stated otherwise, the question is whether the Alien Property Custodian, in the distribution of assets in his possession, may deny recognition to such an attachment lien.

Statutes and Regulations Involved

The pertinent portions of the Trading with the Enemy Act (50 U. S. C. App., Sections 5(b), 9(a) and 34), Executive Order No. 8389 (5 F. R. 1400 as amended by Executive Order 8785, 6 F. R. 2897), and General Ruling No. 12, issued April 21, 1942 by the Treasury Department (7 F. R. 2291) are set forth in the appendix *infra* pages 18-30.

Statement

In 1943, petitioners obtained a lien, by levy under an attachment issued in a suit brought in the Supreme Court of the State of New York, on a debt owed to petitioners' debtor, a Japanese national (R. 19). In that suit, judgment was entered in favor of petitioners in

October, 1946, and amended in February, 1948, to increase the amount recoverable because of the discovery of an additional amount of indebtedness. The judgment as amended was in the sum of $29,633.24 (R. 23).

Petitioners applied to the Treasury for a license to permit payment to them by the debtor, but the application was denied first in February, 1947 and again in February, 1949 (R. 37; 40).

On June 27th, 1947, and again on November 25th, 1947, the Office of Alien Property by successive res vesting orders vested an aggregate of $30,507.72 which the attachment debtor owed to the Japanese national, and the moneys were paid to the Alien Property Custodian (R. 37, 38).

Petitioners filed notice of title claim under Section 9(a) of the Trading with the Enemy Act. That claim was dismissed by the Hearing Examiner who was sustained upon appeal by the Director of the Office of Alien Property (R. 39, 40).

Petitioners then brought the present suit under Section 9(a) of the Trading with the Enemy Act, seeking a judgment declaring that the lien of the attachment upon the chose in action entitled them to a preference in the distribution of the moneys paid to the Alien Property Custodian by the attachment debtor (R. 17-27).

After joinder of issue, respondent moved for judgment on the pleadings, and petitioners cross-moved for summary judgment. The District Court denied respondent's motion and granted petitioners' cross-motion on the authority of *Zittman* v. *McGrath*, 341 U. S. 446. The Court of Appeals reversed, stating that petitioners could maintain a Section 9(a) suit if they had an "interest, right or title" in property held by the Custodian: but concluding that Section 34 of the Trading with the Enemy Act contemplates "the idea of equality" in the distribution of assets held

by the Custodian; that Congress gave authority to the Treasury to nullify attachment liens obtained after the freezing order; that Treasury Ruling No. 12 was an exercise of that authority; and that an unlicensed attachment lien is, therefore, not entitled to preferential treatment in the distribution of assets by the Custodian.

Specifications of Errors to be Urged

The Court of Appeals erred:

1. In refusing to apply the underlying premise of the two *Zittman* decisions that an attachment lien upon blocked property is valid though secured without first having obtained a Treasury license.

2. In holding that Congress had the power to and did authorize the deprivation of a preferential position for "unlicensed" attachment liens, valid under State law and secured prior to a vesting order, in the distribution of the attached assets by the Alien Property Custodian.

3. In construing Section 34 of the Trading with the Enemy Act as indicating the intention of Congress to deprive "unlicensed" attachment liens of any preferential position in the distribution of assets by the Alien Property Custodian.

4. In holding that Treasury Ruling No. 12 prohibits the acquisition of a valid attachment lien in the absence of a Treasury license.

5. In sustaining the validity of the licensing power granted to the Custodian by Section 5(b) of the Trading with the Enemy Act, as implemented by General Ruling No. 12, in the absence of guiding criteria for the exercise of such power.

Reasons for Granting the Writ

1. (a) The question presented by this case, one of great importance in the administration of the Trading with the Enemy Act, was specifically left open by this Court in *Zittman* v. *McGrath,* 341 U. S. 446 and *Zittman* v. *McGrath,* 341 U. S. 471 (respectively referred to herein as Zittman No. 1 and Zittman No. 2). The answer furnished by the Court below is erroneous as a matter of statutory interpretation. It is, moreover, in conflict with the premise underlying this Court's decisions in the *Zittman* cases. Because the Court below has erroneously interpreted the statute in an area of wide importance, and because its decision is irreconcilable with the rationale of the *Zittman* decisions; this case is a peculiarly appropriate occasion for the exercise of this Court's certiorari jurisdiction.

(b) In *Zittman No. 1,* this Court, reversing the Court of Appeals for the Second Circuit, held that attachment levies were not "transfers" forbidden by Executive Order 8389, and that the Custodian was not entitled to a declaratory judgment that the attachment creditor "obtained no lien or other interest" in the attached property.

In *Zittman No. 2,* this Court held that as between an attachment creditor and the Custodian, under a res vesting order, the Custodian was entitled to possession of the property upon which the levy of attachment had been made and that "the consequences, if any, that flow from the substitution of the Custodian in place of the Bank as holder of the funds, upon rights derived from valid state court judgments secured by attachment are not ripe for determination" (341 U. S. at 474).

Those issues are now presented for determination. We are informed that the Custodian and the parties to the *Zittman* cases are awaiting the outcome of this litigation to ascertain their respective rights and obligations. The

Sheriff of the County of New York, one of the petitioners here, has many attachments in his office, the validity of which is in question. The orderly and prompt distribution of assets vested by the Custodian requires a final settlement by this Court of the question at issue.

2. While the point presented in this case was left open by this Court in the *Zittman* decisions, the ruling below is in irreconcilable conflict with the premise upon which they rest.

In *Zittman No. 1,* where the Custodian had issued merely a "right, title and interest" vesting order, this Court said that such orders merely put him in the shoes of the judgment debtors and since as against such debtors "the attachments and the judgments they secure are valid under New York law, and cannot be cancelled or annulled under a Vesting Order by which the Custodian takes over only the right, title and interest of those debtors in the accounts", the attachment creditor was entitled to possession of the res (341 U. S. 446 at 464).

Mr. Justice Jackson, in his opinion for the Court, went on to say: "But, of course, as against the Custodian, exercising the paramount power of the United States, they do not control or limit the federal policy of dealing with alien property and do not prevent a *res* vesting, as sustained in the companion cases, if the Custodian sees fit to take over the entire fund for administration under the Act. In such case, all federal questions as to recognition by the Custodian of the state law lien, or priority of payment, are reserved for decision if and when presented in accordance with the Act" (341 U. S. 446, at 464).

In *Zittman No. 2,* this Court said that where the Custodian has issued a res vesting order "the transfer of possession of these funds does not purport to work any automatic deprivation of rights of any class of creditors, but takes over the estate for administration" (341 U. S. 471,

at 474). Again this Court spoke of rights derived from "valid state court judgments secured by attachment" (341 U. S. 471, at 474).

The decision below, however, is premised upon the view that no valid attachment lien could be secured in the absence of a Treasury license. The Court of Appeals put the question as follows: "Does a lien procured in an 'unlicensed' attachment suit give rise to a lien acquired 'lawfully' as against the Custodian when he makes a res vesting order?" This question was answered in the negative on the ground that Treasury Ruling No. 12 "provided that any unlicensed transfer of property in a blocked account after the effective date of the Executive Order was null and void" and that an attachment was within the scope of the term "transfer" (R. 79).

If, as this Court has said, an attachment in accordance with state court process is "valid", it creates a lien. The settled legal effect of a lien is to give the lienor an interest in the property superior to claims of general creditors.[1] The decision below has deprived petitioners of such rights.

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[1] Chief Justice Cardozo noted the nature of the property interest created by an attachment lien in *Matter of People (First Russian Ins. Co.)* 253 N. Y. 365:

> "The claimant, the attaching creditor, is not asserting a claim to participate in the fund as a beneficiary of a trust, a member of the class or group for whom administration was assumed. The claim which it asserts is not in subordination to the trust, but in priority and even, in a sense, in hostility thereto. The lien of its attachment has put it in the same position as if it were the holder of a mortgage or of an equitable lien, the product of agreement. A receiver or other officer taking such a fund into his custody, must take it as he finds it, with all its imperfections on its head. One of those imperfections for this receivership was a lien created as security, not for principal alone, but for principal and interest. The fund is not free until the lien has been discharged" (p. 368).

In this setting it is misleading to draw a distinction, as the court below did, between the effect of the attachment lien as between the attachment creditor and the Custodian, on the one hand, and the attachment creditor and debtor, on the other hand. In denying recognition to petitioners' attachment lien, the Custodian has not subordinated petitioners' claim to that of the Government. He has destroyed petitioners' preferential position as against general creditors.

Thus, the decision of the Court of Appeals has, in effect, denied the validity of petitioners' attachment lien. It is wholly inaccurate to say that this is merely denial of recognition as between petitioners and the Custodian. As a matter of substance, it is a destruction of property rights for the benefit of creditors who otherwise would be subordinate to petitioners' claim.

In the truest sense, the decision below, therefore, conflicts with the ruling of this Court in the *Zittman* cases that such attachment liens are valid.

See also: *Lyon* v. *Singer*, 339 U. S. 841.

3. The decision below erroneously construes and applies Section 34 of the Trading with the Enemy Act. The Court of Appeals concluded that the provision of Section 34(a) that the property vested in the Custodian "shall be equitably applied by the Custodian * * * to the payment" of the alien debtor's debts indicates an intention of Congress that attachment liens shall be deprived of a preferential position. The Court said: "The words 'equitable', 'administration' and 'liquidation' reinforce the idea of equality and suggest repugnance to the notion that the race should be to the swift among the creditors" (R. 78).

It should be observed that the Court of Appeals also rested upon the fact that Justices Reed and Burton "apparently reached a conclusion adverse to the contention

made by the plaintiffs in the instant case". The reference is to the dissenting opinion of Mr. Justice Reed in *Zittman No. 1.*

Against this should be noted the concurring opinion of Mr. Justice Douglas, in which he said: "But the policy of the Act is in no way subverted by recognition of a lien which can ripen into a priority only if payment would have no such effect. Denial of the lien could be made only if the Act called for an equality of distribution among claimants, regardless of their innocence or guilt. I can find nothing in the Act which warrants leveling the good faith lien claimant to the unsecured status of the others" (341 U. S. 442, at 465). In a footnote, Mr. Justice Douglas calls attention to the fact that "The priority of debt claims contained in Section 34(g), 60 Stat. 925, 928, does not purport to deal with creditors preferred by reason of a lien lawfully acquired in judicial proceedings" (341 U. S. 442, at 465).

Judge Frank, in his opinion below, supported the authority of Congress to nullify attachment liens obtained after the freezing order, on the analogy of the effect of bankruptcy on preferences. There is nothing in the Trading with the Enemy Act to justify the view that Congress intended to vest in the Custodian the extraordinary powers of a bankruptcy court. Indeed, it is questionable that Congress could constitutionally do so.

> *Ochoa* v. *Hernandez y Morales,* 230 U. S. 139;
> *Lynch* v. *United States,* 292 U. S. 571.

In *Security-First National Bank* v. *Rindge Land & Nav. Co.,* 85 Fed. (2d) 557, the Court of Appeals for the 9th Circuit said:

> "The right to retain a lien until the debt secured thereby is paid is a substantive property right which may not be taken from the creditor consistently with

the Fifth and Fourteenth Amendments to the Constitution" (85 Fed. (2d) at 561).

In *Chemical Foundation* v. *E. I. Du Pont*, 29 Fed. (2d) 597, the District Court for the District of Delaware said:

> "A chose in action is property. The Fifth Amendment to the Constitution of the United States, providing that no person shall be deprived of his property without due process of law, denies to the Congress power to transfer property from one to another, directly or indirectly" (29 Fed. (2nd) at 602).

The decision of the Court below has violated these principles. The ultimate disposition of vested property among claimants thereto does not involve an exercise of the war powers of Congress (See *Chemical Foundation* v. *Du Pont*, *supra*). Congress may not itself destroy a lien acquired in accordance with State law to the advantage of general creditors of an alien debtor, and *a fortiori* may not delegate to the Custodian the judicial authority to do so.

In any event, the history of Section 34 of the Trading with the Enemy Act demonstrates that the Court of Appeals erroneously interpreted the statute.

Section 34 was embodied in a bill to amend the First War Powers Act of 1941, the purpose of which was explained in House Report No. 2398, 79th Congress, Second Session. Section 34 (which was numbered 35 in the bill) was intended "to provide machinery for paying claims of creditors against the former owners of vested properties on an equitable basis to the extent that the assets vested from each debtor permit" (at p. 1).

Section 35 of the bill (Sec. 34 of the Act) was at least in part the result of a decision of this Court in *Markham* v. *Cabell*, 326 U. S. 404, which held that an ordinary creditor of an enemy alien had the right to sue the Custodian

under Section 9(a) and to be paid on a "first come, first served" basis (House Report, No. 2398, 79th Cong. 2nd Sess. at pp. 9-10).

The Committee disclaimed any intention to change the status of a secured creditor or a creditor claiming a lien, saying:

> "Protection of a secured creditor or a creditor claiming a lien is afforded by the proviso in subsection (i). Such a claimant may proceed as a general creditor, without thereby waiving his security. In addition or alternatively, he may file a claim or suit as a title claimant for return of his security interest in the property or for just compensation in respect of that interest, in which event his recovery would be reduced, as in the case of any other such plaintiff, to the extent of any debt claim payment made to him (or to any other claimant, if his claim as a title claimant was not filed in time to hold up debt claim payments). It is believed that this arrangement is preferable to provision of a separate special procedure for secured creditors" (House Report No. 2398, 79th Cong., 2nd Sess. at p. 15).

Nothing in Section 34 or in its legislative background justifies the conclusion that the principle of "equitable distribution" was intended to reduce lien creditors to the status of debt claimants. Mr. Justice Douglas took his position squarely on this construction of Section 34 in his concurring opinion in *Zittman No. 1* (see p. 8, *supra*).

The language of the section itself refutes the conclusion of the Court of Appeals. Section 34 (i) provides that "the sole relief and remedy available to any person seeking satisfaction of a debt claim * * *" shall be that provided in Section 34; but this is limited by the proviso "that no person asserting any interest, right, or title in any property or interest or proceeds acquired by the Alien Property Cus-

further maintained except in conformity with this section: *Provided,* That no person asserting any interest, right, or title in any property or interest or proceeds acquired by the Alien Property Custodian, shall be barred from proceeding pursuant to this Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section; nor shall any security interest asserted by the creditor in any such property or interest or proceeds be deemed to have been waived solely by reason of such proceeding. The Alien Property Custodian shall treat all debt claims now filed with him as claims filed pursuant to this section. Nothing contained in this section shall bar any person from the prosecution of any suit at law or in equity against the original debtor or against any other person who may be liable for the payment of any debt for which a claim might have been filed hereunder. No purchaser, lessee, licensee, or other transferee of any property or interest from the Alien Property Custodian shall, solely by reason of such purchase, lease, license, or transfer, become liable for the payment of any debt owed by the person who owned such property or interest prior to its vesting in or transfer to the Alien Property Custodian. Payment by the Alien Property Custodian to any debt claimant shall constitute, to the extent of payment, a discharge of the indebtedness represented by the claim.

* * *

2. Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order 8785, June 14, 1941, 6 F. R. 2897:

By virtue of and pursuant to the authority vested in me by Section 5 (b) of the Act of October 6, 1917 (40 Stat. 415), as amended, by virtue of all other authority vested in me, and by virtue of the existence of a period of unlimited national emergency, and finding that this Order is in the public interest and is necessary in the interest of national defense and security, I, FRANKLIN D. ROOSEVELT, PRESIDENT

OF THE UNITED STATES OF AMERICA, do prescribe the following:

SEC. 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury, by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to, the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent, outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coins or bullion or currency, by any person within the United States;

E. All transfers, withdrawals, or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

todian, shall be barred from proceeding pursuant to this Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section; nor shall any security interest asserted by the creditor in any such property or interest or proceeds be deemed to have been waived solely by reason of such proceeding."

This is a plain recognition that the remedies provided by section 9(a) of the Act remain unimpaired. An attachment creditor by virtue of his lien upon the property attached is one of the class of creditors whose rights under Section 9(a) are expressly preserved.

Judge Frank, in his opinion below, said: "The absence of any provision according priority to attachment liens indicates an intention to deprive them of any preferential position". We submit to the contrary, that the absence of any provision in Section 34 indicating an intention that attachment liens should be deprived of the status theretofore enjoyed under Section 9(a) demonstrates that Congress did not intend to reduce the attachment creditor to the status of an unsecured creditor. This Court said in *Markham* v. *Cabell*, 326 U. S. 404, at 411:

> "We can find no indication in the 1941 legislation that Congress by amending Section 5(b) desired to delete or wholly nullify Section 9(a). On the contrary, the normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole."

The intention of Congress to preserve the rights theretofore existing under Section 9(a) is affirmatively expressed in the following statement in Senate Report No. 1839, 79th Congress, Second Session, at Page 2:

> "The bill as thus amended preserves in full these rights under Section 9(a) which the friendly foreign

national, together with the United States citizen has had for more than 25 years under the act."

The decision below has engrafted a limitation upon Section 9(a) which is not justified by the wording of Section 34 or by the express policy of Congress which led to the enactment of that Section.

4. General Ruling No. 12 was incorrectly interpreted by the Court below.

The Court of Appeals' view of General Ruling No. 12 upon which its decision rests, is in irreconcilable conflict with the interpretation of that Ruling adopted by this Court in *Littman No. 1*. Mr. Justice Jackson gave careful consideration to the Ruling, pointing out that if the Government's construction of the Ruling were adopted, the result would be "inconsistent and irreconcilable with the contentions made one day after its issuance by both the Treasury and the Department of Justice to the New York Court of Appeals" (341 U. S. at 453).

The majority opinion quoted extensively from a brief *amicus curiae* dated April 22nd, 1942, filed by the Treasury and the Department of Justice in the New York Court of Appeals in *Commission for Polish Relief* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332. We should like particularly to note one sentence quoted from that brief: "So far as foreign funds control is concerned, there can be an attachable interest under New York law with respect to the blocked assets" (341 U. S. at 465).

After considering the shift in the Government's position following the decision of this Court in *Propper* v. *Clark*, 337 U. S. 472, this Court concluded as follows:

> "But, as the Government before that decision so unequivocally urged upon the New York Court of Appeals, attachment proceedings as pursued in these

cases have no such consequences. Nothing in these state court proceedings have purported to frustrate the purposes of the federal freezing program. On the contrary, the effect of the State's action, like that of the federal, was to freeze these funds, to prevent their withdrawal or transfer to use of the German nationals. There is no suggestion that these attachment proceedings could in any manner benefit the enemy. The sole beneficiaries are American citizens whose liens are not derived from the enemy but are adverse to any enemy interests. And, if no federal freeze orders were in existence, these state proceedings would tie up enemy property and reduce the amounts available for enemy disposition. We agree with the Government's assurance to the Court of Appeals in the Polish Relief case that these proceedings, in view of the fact that they do not purport to control the Custodian in the exercise of the federal licensing power, or in the power to vest the *res* if he sees fit to do so for administration, are not inconsistent with the freezing program and we think they were not invalidated or considered in Propper v. Clark, supra" (341 U. S. at 462, 3).

The Court of Appeals apparently reasoned that, although General Ruling No. 12 provided that an unlicensed transfer of property in a blocked account was "null and void", the attachment in the case at bar could be valid as between the parties, but invalid as against the Custodian. General Ruling No. 12 is thus given a meaning which is neither justified by its language nor required by any considerations of policy in the administration of the Custodian's office.

This Court has held that General Ruling No. 12 properly construed does not require a Treasury license as a condition precedent to a valid attachment under State law.

The Treasury and the Department of Justice have said that considerations of administration do not impel the interpretation of General Ruling No. 12 which the Government urged in the *Zittman* cases. If the so-called "unlicensed" attachment is valid, then plaintiff, as a lien creditor, has statutory rights under Section 9(a) which cannot be brushed aside by a factitious distinction that the lien, though valid as between the parties, is invalid as against the Custodian.

This Court in *Lyon* v. *Singer*, 339 U. S. 841, and its companion cases confirmed the view that a preferential position may be secured under state law in spite of the absence of a license, and that the freezing order with its attendant restrictions did not prevent the creation of a claim entitled to a preference under state law.

This Court has left open the effect of the lien as between the attachment creditor and the Custodian. This is not to say that this Court has suggested that the lien might be disregarded or invalidated by a construction of General Ruling No. 12 such as Judge Frank adopted in his opinion.

We suggest that the only question properly open is whether the lien creditor may enforce payment by suit against the Custodian under Section 9(a) prior to final liquidation of the vested assets, or whether orderly administration may require that distribution to creditors of all classes be deferred until a final determination of all preferences and priorities.

In this case, however, no showing was made by the Custodian on the motions in the District Court that any considerations of administration required deferment of payment to petitioners. On the record, therefore, petitioners were entitled to judgment in accordance with the provisions of Section 9(a).

5. The Court of Appeals held that in the absence of a license, the attachment lien is invalid. This necessarily implies the constitutionality of Section 5(b) of the Trading with the Enemy Act and the validity of General Ruling No. 12 as an exercise of the power granted by the statute.

The Court of Appeals, however, did not consider this question of constitutionality, although the record discloses that while petitioners have twice been refused a license, the Custodian has granted retroactive licenses to other attachment creditors (see Supplemental Complaint, Par. 25—admitted by Answer, Par. 8—R. 24, 30). Petitioners' applications for license were denied without assignment of any reason therefor by the Custodian. This action was a purely arbitrary exercise of the Custodian's claimed power to grant or withhold a license in his unrestricted discretion. The interpretation of General Ruling No. 12 adopted by the Court of Appeals is not only inconsistent with this Court's construction of the Ruling in the *Zittman* cases but presents a question of the constitutionality of Section 5(b) of the Trading with the Enemy Act for consideration.

* * *

Nothing in the decisions of this Court can be cited in justification of the interpretation of the statute adopted below. If the decision below is permitted to stand the effect upon the administration of the Trading with the Enemy Act will be profound. The Custodian will necessarily assume the authority of a Referee in Bankruptcy in many cases. The residual force of Section 9(a) will be uncertain. In fact, the scheme of administration of enemy assets contemplated in the 1946 legislation as expressed in the House Report referred to above will be completely subverted. The principle of "equitable distribution" will have been converted into a weapon to destroy rights secured under state law and recognized as valid by this Court. Such a result is in essential conflict with the

Zittman decisions. And no compelling interest of the United States dictates the result reached below. This Court should, therefore, exercise its certiorari jurisdiction to set this matter right.

Conclusion

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

DONALD MARKS,
Counsel for Petitioners.

APPENDIX

1. Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. 1 et seq:

* * * *

Sec. 5, as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App. 5:

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person, as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property, shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or per-

son may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * * *

§ 9. (a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it

has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * *

SEC. 34 (a) Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting or transfer, or if it arose from any action or transactions prohibited by or pursuant to this Act and not licensed or otherwise authorized pursuant thereto, or (except in the case of debt claims acquired by the Custodian) if it was at the time of such vesting or transfer due and owing to any

person who has since the beginning of the war been convicted of violation of this Act, as amended, sections 1-6 of the Criminal Code (18 U. S. C. 1-6), title I of the Act of June 15, 1917 (ch. 30, 40 Stat. 217), as amended; the Act of April 20, 1918 (ch. 59, 40 Stat. 534), as amended; the Act of June 8, 1934 (ch. 327, 52 Stat. 631), as amended; the Act of January 12, 1938 (ch. 2, 52 Stat. 3); title I, Alien Registration Act, 1940 (ch. 439, 54 Stat. 670); the Act of October 17, 1940 (ch. 897, 54 Stat. 1201); or the Act of June 25, 1942 (ch. 447, 56 Stat. 390). Any defense to the payment of such claims which would have been available to the debtor shall be available to the Custodian, except that the period from and after the beginning of the war shall not be included for the purpose of determining the application of any statute of limitations. Debt claims allowable hereunder shall include only those of citizens of the United States or of the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia or the Philippine Islands; those of other natural persons who are and have been since the beginning of the war residents of the United States and who have not during the war been interned or paroled pursuant to the Alien Enemy Act (50 U. S. C. 21); and those acquired by the Custodian. Legal representatives (whether or not appointed by a court in the United States) or successors in interest by inheritance, devise, bequest, or operation of law of debt claimants, other than persons who would themselves be disqualified hereunder from allowance of a debt claim, shall be eligible for payment to the same extent as their principals or predecessors would have been.

(b) The Custodian shall fix a date or dates after which the filing of debt claims in respect of any or all debtors shall be barred, and may extend the time so fixed, and shall give at least sixty days' notice thereof by publication in the Federal Register. In no event shall the time extend beyond

the expiration of two years from the date of the last vesting in or transfer to the Custodian of any property or interest of a debtor in respect of whose debts the date is fixed, or from the date of enactment of this section, whichever is later. No debt shall be paid prior to the expiration of one hundred and twenty days after publication of the first such notice in respect of the debtor, nor in any event shall any payment of a debt claim be made out of any property or interest or proceeds in respect of which a suit or proceeding pursuant to this Act for return is pending and was instituted prior to the expiration of such one hundred and twenty days.

(c) The custodian shall examine the claims, and such evidence in respect thereof as may be presented to him or as he may introduce into the record, and shall make a determination, with respect to each claim, of allowance or disallowanee, in whole or in part.

(d) Payment of debt claims shall be made only out of such money includ 1 in, or received as net proceeds from the sale, use, or other disposition of, any property or interest owned by the debtor immediately prior to its vesting in or transfer to the Alien Property Custodian, as shall remain after deduction of (1) the amount of the expenses of the Office of Alien Property Custodian (including both expenses in connection with such property or interest or proceeds thereof, and such portion as the Custodian shall fix of the other expenses of the Office of Alien Property Custodian), and of taxes, as defined in section 36 hereof, paid by the Custodian in respect of such property or interest or proceeds, and (2) such amount, if any, as the Custodian may establish as a cash reserve for the future payment of such expenses and taxes. If the money available hereunder for the payment of debt claims against the debtor is insufficient for the satisfaction of all claims allowed by the Custodian, ratable payments shall be made in accordance with

subsection (g) hereof to the extent permitted by the money available and additional payments shall be made whenever the Custodian shall determine that substantial further money has become available, through liquidation of any such property or interest or otherwise. The Custodian shall not be required through any judgment of any court, levy of execution, or otherwise to sell or liquidate any property or interest vested in or transferred to him, for the purpose of paying or satisfying any debt claim.

(e) If the aggregate of debt claims filed as prescribed does not exceed the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall pay each claim to the extent allowed, and shall serve by registered mail, on each claimant whose claim is disallowed in whole or in part, a notice of such disallowance. Within sixty days after the date of mailing of the Custodian's determination, any debt claimant whose claim has been disallowed in whole or in part may file in the District Court of the United States for the District of Columbia a complaint for review of such disallowance naming the Custodian as defendant. Such complaint shall be served on the Custodian. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to the claim in question. Upon good cause shown such time may be extended by the court. Such record shall include the claim as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, and the determination of the Custodian with respect thereto, including any findings made by him. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian, or could not reasonably have been adduced before him or was not available to him. The court shall enter judgment affirming, modifying, or reversing the Custodian's

determination, and directing payment in the amount, if any, which it finds due.

(f) If the aggregate of debt claims filed as prescribed exceeds the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall prepare and serve by registered mail on all claimants a schedule of all debt claims allowed and the proposed payment to each claimant. In preparing such schedule, the Custodian shall assign priorities in accordance with the provisions of subsection (g) hereof. Within sixty days after the date of mailing of such schedule, any claimant considering himself aggrieved may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Custodian as defendant. A copy of such complaint shall be served upon the Custodian and on each claimant named in the schedule. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to such schedule. Upon good cause shown such time may be extended by the court. Such record shall include the claims in question as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, any findings or other determinations made by the Custodian with respect thereto, and the schedule prepared by the Custodian. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian, or could not reasonably have been adduced before him or was not available to him. Any interested debt claimant who has filed a claim with the Custodian pursuant to this section, upon timely application to the court, shall be permitted to intervene in such review proceedings. The court shall enter judgment affirming or modifying the schedule as prepared by the Custodian and directing payment, if any be found due, pursuant to the

schedule as affirmed or modified and to the extent of the money from which, in accordance with subsection (d) hereof, payment may be made. Pending the decision of the court on such complaint for review, and pending final determination of any appeal from such decision, payment may be made only to an extent, if any, consistent with the contentions of all claimants for review.

(g) Debt claims shall be paid in the following order of priority: (1) Wage and salary claims, not to exceed $600; (2) claims entitled to priority under sections 191 and 193 of title 31 of the United States Code, except as provided in subsection (h) hereof; (3) all other claims for services rendered, for expenses incurred in connection with such services, for rent, for goods and materials delivered to the debtor, and for payments made to the debtor for goods or services not received by the claimant; (4) all other debt claims. No payment shall be made to claimants within a subordinate class unless the money from which, in accordance with subsection (d) hereof payment may be made permits payments in full of all allowed claims in every prior class.

(h) No debt of any kind shall be entitled to priority under any law of the United States or any State, Territory, or possession thereof, or the District of Columbia, solely by reason of becoming a debt due or owing to the United States as a result of its acquisition by the Alien Property Custodian.

(i) The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the proceeds thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted, or

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * *

3. General Ruling No. 12, April 21, 1942, 7. F. R. 2991:

(1) Unless licensed or otherwise authorized by the Secretary of the Treasury, (a) any transfer after the effective date of [Executive Order No. 8389, see General Ruling No. 4, par. (1), *supra*] is null and void to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer; and (b) no transfer after the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account (irrespective of whether such property was in a blocked account at the time of such transfer).

(2) Unless licensed or otherwise authorized by the Secretary of the Treasury, no transfer before the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account unless the person with whom such blocked account is held or maintained had written notice of the transfer or by any written evidence had recognized such transfer prior to the effective date of the Order.

(3) Unless otherwise provided, an appropriate license or other authorization issued by the Secretary of the Treasury before, during, or after a transfer shall validate such transfer or render it enforceable to the same extent as it would be valid or enforceable but for the provisions of section 5 (b) of the Trading with the Enemy Act, as amended, and Order, regulations, instructions and rulings issued thereunder.

(4) Any transfer affected by the Order and/or this general ruling, and involved in, or arising out of, any action

or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated: *Provided, however,* That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.

(5) For the purposes of this general ruling:

(a) The term "transfer" shall mean any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and without limitation upon the foregoing shall include the making, execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit, or statement; the appointment of any agent, trustee, or other fiduciary; the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition, or the exercise of any power of appointment, power of attorney, or other power: *Provided, however,* That the term "transfer" shall not be deemed to include transfers by operation of law.

(b) The term "property" includes gold, silver, bullion, currency, coin, credit, securities (as that term is defined in section 2 (1) of the Securities Act of 1933, as amended), bills of exchange, notes, drafts, acceptances, checks, letters of credit, book credits, debts, claims, contracts, negotiable documents of title, mortgages, liens, annuities, insurance policies, options and futures in commodities, and evidences of any of the foregoing. The term "property" shall not, except to the extent indicated, be deemed to include chattels or real property.

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